STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1435

State of Minnesota,
Respondent,

vs.

Barry Ishmael McReynolds,
Appellant.

Filed August 16, 2021
Affirmed; motion denied
Florey, Judge
Dissenting, Jesson, Judge

Dakota County District Court
File No. 19WS-CR-19-1004

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Cassandra C. Wolfgram, Bridget M. Nason, LeVander, Gillen & Miller, P.A., South St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Jesson, Judge; and Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

FLOREY, Judge

In this direct appeal from his conviction of interference with privacy, appellant argues that his guilty plea was invalid and that he should be permitted to withdraw his plea

because the factual basis for the plea does not constitute the offense to which he pleaded guilty. In a supplemental pro se brief, appellant also argues that he was falsely arrested and maliciously prosecuted. We affirm.

FACTS

Appellant Barry Ishmael McReynolds was charged with interference with privacy in violation of Minn. Stat. § 609.746, subd. 1(b) (2016), after taking photos and a video of S.C.A.D. without her consent. McReynolds and S.C.A.D. had gone on their first date the evening before the photos and video were taken, and McReynolds spent the night at S.C.A.D.'s apartment. The next morning, S.C.A.D. found McReynolds with her phone and saw that he had sent several nude photos and a video of her while sleeping in bed to his phone via text message.

In a Mirandized statement, McReynolds told officers that he took several photos and a video of S.C.A.D. while she was naked. When asked if S.C.A.D. was aware that he was making a video, McReynolds responded, "I tried not to make her aware of it because she would have fussed at me." The officer asked if McReynolds meant that S.C.A.D. would have said no, and McReynolds replied, "Probably more likely because she, at first, she was telling me she didn't when I first met her. I don't send pictures and stuff. But when we were at a restaurant she showed me all kind of sh--." A search of McReynolds's cellphone revealed a video of an apparently sleeping woman's vagina, anus, and back tattoo. S.C.A.D. identified the tattoo as hers and denied consenting to being recorded.

At an omnibus hearing, McReynolds sought a continuance, claiming untimely discovery, and asked to discharge the public defender. The district court denied his request.

On the day trial was set to begin, McReynolds wrote a letter seeking a continuance in order to obtain private counsel. He gave the following reasons in support of his request: "I do not believe nor have confidents [sic] that my defense team is ready to move forward to defend my case to my full best interests;" "since the case has been amended this year of 2019, I have had minimal contact with my attorney on this case;" "each time we have conversed it has be [sic] AT COURT only;" and "I have just received documents/discoveries in this case the day of trial." The district court informed McReynolds that it would not reconsider his request.

McReynolds ultimately pleaded guilty to interference with privacy, indicating on the record that he was of clear mind, understood the charges, and was entering the plea freely and voluntarily. While McReynolds provided the factual basis for the plea, the district court judge clarified that he "intended to interfere with [S.C.A.D.'s] privacy by not informing her that [he was] taking the video," and McReynolds responded, "I would have to affirm that with a certain part of her body; yes." The district court found that McReynolds provided a sufficient factual basis to support his guilty plea.

Prior to sentencing, McReynolds moved to withdraw his guilty plea because he did not have adequate time to prepare, he felt coerced into pleading guilty, he did not believe the factual basis for the plea fit the elements of the crime with which he was charged, and he had not had an opportunity to obtain private counsel. The district court denied the motion, finding that the McReynolds's proffered reasons in support of withdrawal were unsupported by the record and that the state would be significantly prejudiced by

withdrawal of the plea. The district court stayed imposition of sentence and placed McReynolds on probation. This appeal followed.

In addition to the brief filed by his appellate counsel, McReynolds filed a pro se supplemental brief, arguing that it was in his best interest to withdraw his plea because he "gave a confused statement" to investigators; his property was illegally taken and searched; the prosecutor maliciously waited to charge him; and he was falsely arrested. He explained that S.C.A.D. welcomed him inside of her home, sent him nude photos, and allowed him to record her. He also raised claims of ineffective assistance of counsel, malicious prosecution, and threats and coercion by the district court. The state moved to strike McReynolds's pro se brief, arguing that it was unsupported by the record and cited no legal authority.

DECISION

I. McReynolds's guilty plea to interference with privacy in violation of Minn. Stat. § 09.746, subd. 1(b), is valid.

The validity of a guilty plea is a question of law that we review de novo. *State v. Boecker*, 893 N.W.2d 348, 350 (Minn. 2017). A valid guilty plea must be "accurate, voluntary, and intelligent." *Id*. at 350. A defendant may withdraw a guilty plea at any time to correct "a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. "A manifest injustice exists if a guilty plea is not valid, but a defendant bears the burden of showing his plea was invalid." *Boecker*, 893 N.W.2d at 350 (quotations omitted). "When a plea is not established with a proper factual basis, it is not accurate and, therefore, is invalid." *Id*.

McReynolds argues that his guilty plea lacks a proper factual basis because his conduct was not a violation of Minn. Stat. § 609.746, subd. 1(b). Specifically, he argues that "he did not use his cellphone's camera to record [S.C.A.D.] 'through a window or aperture of a house or place of dwelling of another.'" *Id*. Therefore, to determine whether McReynolds's plea was supported by an accurate factual basis, this court must interpret the invasion-of-privacy statute, Minn. Stat. § 609.746, subd. 1(b).

The interpretation of a statute is a question of law that this court reviews de novo. *Boecker*, 893 N.W.2d at 350-51. "A statute must be construed as a whole and the words and sentences therein are to be understood in light of their context." *Id.* at 51 (quotations omitted). "We interpret a statute as a whole so as to harmonize and give effect to all its parts, and where possible, no word, phrase, or sentence will be held superfluous, void, or insignificant." *Id.* (quotations omitted).

The statute defining the crime of invasion of privacy provides:

> A person is guilty of a gross misdemeanor who . . . enters upon another's property; . . . surreptitiously installs or uses any device for observing, photographing, recording, amplifying, or broadcasting sounds or events through the window or any other aperture of a house or place of dwelling of another; and. . . does so with intent to intrude upon or interfere with the privacy of a member of the household.

Minn. Stat. § 609.746, subd. 1(b).

McReynolds contends that his conduct could only have violated the statute "if he recorded [S.C.A.D.] through a window or some other opening connected to her apartment." Because McReynolds testified that he recorded S.C.A.D. while they were in bed together, he argues that his admissions were insufficient to support the charged crime.

The invasion-of-privacy statute does not define the phrase "any other aperture of a house or place of dwelling" as used in subd. 1(b). We therefore first look to dictionary definitions to determine the common and ordinary meanings of these terms. *State v. Thonesavanh*, 904 N.W.2d 432, 436 (Minn. 2017).

> "Aperture" is defined as: "1. An opening, such as a hole, gap, or slit. 2. A [usually] adjustable opening in an optical instrument, such as a camera, that limits the amount of light that can enter."

The American Heritage College Dictionary 62 (3d ed. 1997). *See State v. Morris*, 644 N.W.2d 114, 116 (Minn. App. 2002) (using the same definition), *review denied* (Minn. July 16, 2002). This court has applied both definitions when interpreting other similar subdivisions of the invasion-of-privacy statute. First, in *Morris*, 644 N.W.2d at 116, this court considered the definition of "aperture" for purposes of Minn. Stat. § 609.746, subd. 1(d). This subdivision provides in relevant part:

> A person is guilty of a misdemeanor who . . . surreptitiously installs or uses any device for observing, photographing, recording, amplifying, or broadcasting sounds or events through the window or other aperture of a sleeping room in a hotel . . ., a tanning booth, or other place where a reasonable person would have an expectation of privacy and has exposed or is likely to expose their intimate parts . . .

In that case, appellant used a video camera to videotape underneath females' skirts in a department store. *Id.* at 115. This court affirmed the district court's finding that "every camera has, and effectively is, an aperture," and determined that appellant's use of a video camera to photograph the victim's intimate parts through the "aperture of his camera," and "through the opening (aperture) in [the victim's] skirt," a place within the meaning of the

statute because it has a defined spatial location that is associated with a person's intimate parts, was a violation of the statute. *Id.* at 117. This court further affirmed the district court's finding that appellant's argument that "the absence of a 'window or other aperture,' and the consequential assertion that an aperture must be an 'opening' like a window in a sleeping room . . . is a red herring." *Id.* at 116-17.

While McReynolds acknowledges that the definition of "aperture" from *Morris* includes his cellphone's camera, he argues that definition should not apply to an analysis of Minn. Stat. § 09.746, subd. 1(b), because that subdivision "expressly requires that the aperture be 'of a house or a place of dwelling' not the aperture 'of a camera.'" He contends this "contrary interpretation would render the qualifying phrase 'of a home or dwelling' meaningless and superfluous." However, the subdivision at issue in *Morris* similarly stated that the aperture be "of a sleeping room in a hotel" and this court determined the appellant nevertheless violated the statute by intruding on the victim's privacy through the aperture of his video camera.

Here, McReynolds's argument that he did not violate the statute because he took the photos and video in S.C.A.D.'s bed, "not through a window or some other opening connected to her apartment," is unconvincing. Like the appellant in *Morris*, McReynolds used the aperture of S.C.A.D.'s cellphone's camera to take photos of S.C.A.D. while she was in bed in her apartment, a "place of dwelling" within the meaning of the statute. Further, McReynolds admitted that he did not inform S.C.A.D. that he was going to photograph her because he knew she would "fuss" and would likely say no, revealing his intent to interfere with her privacy.

This court further clarified the meaning of "aperture" in *State v. Ulmer*, 719 N.W.2d 213 (Minn. App. 2006) for purposes of Minn. Stat. § 609.746, subd. 1(c). That subdivision provides:

> A person is guilty of a misdemeanor who . . . surreptitiously gazes, stares, or peeps in the window or other aperture of a sleeping room in a hotel . . ., a tanning booth, or other place where a reasonable person would have an expectation of privacy and has exposed or is likely to expose their intimate parts. . ., or the clothing covering the immediate area of the intimate parts . . . and does so with intent to intrude upon or interfere with the privacy of the occupant.

Minn. Stat. § 609.746, subd. 1(c).

There, the appellant recorded a juvenile using a urinal in a public restroom. *Ulmer*, 719 N.W.2d at 214. This court determined that the area above a urinal partition was an "aperture" within the meaning of the statute, explaining that "an 'aperture' is simply a space through which an offender obtains a view into that place where a reasonable person has an expectation of privacy." *Id.* at 216.

Here, McReynolds obtained a view of S.C.A.D. while she was sleeping in her bed, a place where she clearly had an expectation of privacy. McReynolds used her phone camera to obtain a view of her intimate parts, again a place "where a reasonable person has an expectation of privacy." *Id.*

McReynolds argues that the plain language of the statute is unambiguous and supports his position that there is an inadequate basis for his plea. However, our previous decisions in *Morris* and *Ulmer*, while not addressing the issue of ambiguity, do not support this argument. Minn. Stat. § 645.16 (2020) provides in part that [t]he object of all

interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions. *Id*.

Minn. Stat. § 609.746, subds. 1(b), 1(c), and 1(d), all prohibit offenders from using a window or aperture to obtain a view inside a protected location. The Minnesota Supreme Court has stated that "[t]he whole thrust of [Minn. Stat. § 609.746] is to protect people from surreptitious intrusion into places where they have a reasonable expectation of privacy." *State v. Pakhnyuk*, 926 N.W.2d 914, 927 (Minn. 2019); *see also State v. Sopko*, 770 N.W.2d 543, 546 (Minn. App. 2009) (explaining "the aim of the statute is to protect an individual's privacy"). When, as here, "the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters," the "consequences of a particular interpretation." Minn. Stat. § 645.16. We also presume that the legislature did not intend an absurd or unreasonable result. Minn. Stat. § 645.17(1) (2020); *see also State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003) (stating same); *State v. Greenman*, 825 N.W.2d 387, 390 (Minn. App. 2013) (stating that courts should give a "reasonable and sensible construction to criminal statutes").

McReynolds argues that because he did not admit that he recorded S.C.A.D "through a window or some other opening into her apartment, or even through a door or opening into another room within her apartment" he did not validly plead guilty to violating Minn. Stat. § 609.746, subd. 1(b). However, McReynolds's suggested interpretation of the statute would lead to an absurd result: it would essentially allow guests in a home to record residents at will so long as the recording was not done through "a window or some other

aperture." In other words, it would remove residents' reasonable expectation of privacy in their own home, an expectation that is supported by Minnesota and federal caselaw. *See e.g. Florida v. Jardines*, 569 U.S. 1, 7, 133 S. Ct. 1409, 1415 (2013) (explaining that privacy expectations are "most heightened" in the home); *State v. Perez*, 779 N.W.2d 105, 109 (Minn. App. 2010) (holding that a wife had a reasonable expectation of privacy in her residential bathroom), *review denied* (Minn. June 15, 2010). Therefore, we determine McReynolds's suggested interpretation of the subdivision is inconsistent with the legislative intent and the purpose of the invasion-of-privacy statute.

For the foregoing reasons, we determine that McReynolds's plea was supported by an accurate factual basis and, therefore, was a constitutionally valid guilty plea.

II. The issues alleged in McReynold's pro se brief have been forfeited.

Pro se litigants are generally held to the same standards as attorneys. *State v. Meldrum*, 724 N.W.2d 15, 22 (Minn. App. 2006). Allegations raised in a brief that contain no argument or citation to any legal authority or are outside of the record are deemed forfeited. *Id.* Generally, we do not consider arguments on appeal that were not raised below. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Here, McReynolds's allegations that he was falsely arrested and maliciously prosecuted, as well as his claims in support of his request for plea withdrawal, have no support in the appellate record and include no argument or legal citation; therefore, they have been forfeited.

Affirmed; motion denied.

JESSON, Judge (dissenting)

I respectfully dissent.

No one should be surreptitiously photographed while sleeping, uncovered, in bed. Even by an invited guest. But the question before us is not whether McReynold's conduct qualifies as morally repugnant—it does. The question is whether taking a nude photograph of another within their bedroom violates this particular law: Minnesota Statutes section 609.746, subdivision 1(b) (2016). A direct examination of the law leads to one conclusion: it does not.

The statute here is part of an effort to criminalize the act of peeping with the intent to interfere with another person's privacy. *State v. Pakhnyuk*, 926 N.W.2d 914, 925 (Minn. 2019). The first version of the statute passed in 1979 and was limited to gazing or peeping into the windows of another. 1979 Minn. Laws ch. 258, § 19. Today, the statute has four variations, including subdivision (b), to which McReynolds pleaded guilty. That provision, set out below, relates to the use of devices on someone's private property. It contains four clauses and explicitly states:

> A person is guilty of a gross misdemeanor who *enters upon* another's property;
>
> *surreptitiously* installs or *uses any device* for observing, photographing, recording, amplifying, or broadcasting sounds or events
>
> *through the window or any other aperture of a house or place of dwelling* of another;
>
> and does so with intent to intrude upon or *interfere with the privacy* of a member of the household.

Minn. Stat. § 609.746, subd. 1(b) (emphasis added).

Here, McReynolds entered the property—albeit invited as a guest. He used a device—a cell phone—to photograph S.C.A.D. And clearly he did so to interfere with the privacy of another. As a result, McReynolds' conduct fits the first, second and fourth clauses of the subdivision.

But where was the photo taken? Not through a window, clearly. So we reach the crux of this case: was the photo taken through "any other aperture of a house or place of dwelling?" To answer this question presents an issue of statutory interpretation, which is a question of law this court reviews de novo. *State v. Boecker*, 893 N.W.2d 348, 350-51 (2017).

Construing the phrase "any other aperture of a house or place of dwelling," I conclude that Minnesota Statutes section 609.746, subdivision 1(b), unambiguously contemplates that the photograph be taken through an opening of a house or other dwelling. As the majority notes, there are two common definitions for "aperture." The first is "[a]n opening, such as a hole, gap, or slit." *The American Heritage College Dictionary* 62 (3d ed. 1997). The second is an "adjustable opening in an optical instrument, such as a camera, that limits the amount of light that can enter." *Id.* But only one of those definitions fits the statutory construct here. Substituting the first definition for "aperture" delivers the phrase "any other opening of a house or place of dwelling." Sounds sensible. Not so the resulting phrase using the second definition: "any other adjustable opening in an optical instrument such as a camera of a house or place of dwelling."

Moving on from application of common-sense definitions, I turn to principles of statutory construction. We construe a statute as a whole and "must interpret each section

in light of the surrounding sections." *Am. Fam. Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). And further, under the associated-words canon, "a word is given more precise content by the neighboring words with which it is associated." *County of Dakota v. Cameron*, 839 N.W.2d 700, 709 (Minn. 2013). Accordingly, I consider the words immediately before and after the contested phrase. Because "any other aperture" follows "window," and "window" is closer to the definition of "an opening"—as opposed to a camera lens—the type of aperture should share the same definition of the word shortly before it in that series. Additionally, the mention of "aperture" is immediately followed by the phrase "*of* a house or place of dwelling of another." Minn. Stat. § 609.746, subd. 1(b) (emphasis added). This shows that the phrase "any other aperture" should belong to the house or place of dwelling. It is "of" the house, not a device within it.

Yet another principle of statutory construction applies here: do not create superfluous words. *State v. Reyes*, 890 N.W.2d 406, 410 (Minn. App. 2017). We ensure "each word in a statute is given effect." *State v. Thompson*, 950 N.W.2d 65, 69 (Minn. 2020). But following the state's proposed construct, there would no longer be any purpose for the phrase "of a house or place of dwelling," because the aperture in a camera—especially in a device as ubiquitous as a smart phone—can be used anywhere. This would strip the location-based purpose of the statute of its effect.

And while I need not turn to legislative history where, as here, the statutory language is plain, my interpretation is supported by that history. The language now codified at section 609.746, subdivision 1(b), was changed in 1994, when the legislature expanded the definition so that it applied to peeping through not just a window, but also "any other

aperture." Act of May 10, 1994, ch. 636, § 47, 1994 Minn. Laws 2170, 2216–17 (codified as amended at Minn. Stat. § 609.746, subd. 1(b)). This amendment was written to "close a loophole in existing law to prevent someone who interfered with privacy in other ways, such as creating another type of opening from a building's crawl space, from evading criminal liability." *State v. Pakhnyuk*, 926 N.W.2d 914, 926 (Minn. 2019) (quoting Hearing on S.F. 2602, S. Comm. on Crime Prevention, 78th Minn. Leg., Mar. 22, 1994 (letter of Lyon County Attorney Kathryn M. Keena) (expressing concerns that without an amendment the state was unable to prosecute a person who peeped through a hole chiseled in the ceiling of a bathroom)). Adding "any other aperture" to expand the statute to include drilling or creating an opening *into* a wall or ceiling was narrower than what the majority here would extend by including any device with an adjustable lens *from within* a house or dwelling. In short, the 1994 amendment was also not intended to be a catch-all for inappropriate behavior. In a hearing on the bill language, it was noted that this statute was supposed to work in tandem with the harassment statute, and whatever loopholes that existed would be covered by *either* the 1994 amendments made to the peeping law or the 1993 amendments to the harassment statutes.[1] Hearing on S.F. 2602, S. Comm. on Crime Prevention, 78th Minn. Leg., Mar. 22, 1994. Because the legislature directly addressed the

[1] For example, a 1993 amendment expanded the definition of harassment to be "repeated, intrusive, or unwanted acts, words, or gestures that are intended to adversely affect the safety, security, or privacy of another" to also include work places and not just a home. 1993 Minn. Laws ch. 326, art. 2, §§ 14-21.

purpose and intent of this amendment to involve *openings*—and not the mechanisms within a camera—my interpretation is far from "absurd." Minn. Stat. § 645.17(1) (2020).[2]

To resist this plain statutory language and legislative history, the state argues that defining "aperture" to include cameras is dictated by the result in *State v. Morris*, a case involving a man taking pictures up women's skirts, characterizing that holding to expand the definition of "aperture" to include cameras. 644 N.W.2d 114, 114 (Minn. App. 2002). But recall that section 609.746 includes four separate variations, set out in different subdivisions. *Morris* involved the definition of "aperture" in subdivision 1(d), which deals with surreptitious observations of a hotel room, tanning booth or other place where a person expects privacy. Minn. Stat. § 609.746, subd. 1(d). Here, McReynolds pleaded guilty to subdivision 1(b) where the place is a house or other dwelling. *Morris* did not analyze that clause. And the holding in *Morris* was narrow, limited to expanding a "place where a reasonable person would have an expectation of privacy" in subdivision (d) to include up someone's skirt.[3] *Id.* In sum, *Morris* does not dictate the decision in this case.

[2] Nor does my interpretation of Minnesota Statutes section 609.746 (2016) create a vacuum for the criminal punishment of behavior similar to McReynold's actions. For example, Minnesota Statutes section 617.261 (2020) makes it a crime to intentionally disseminate an image of another person "whose intimate parts are exposed, in whole or in part."

[3] Similarly, *State v. Ulmer* is factually distinct from this case. 719 N.W.2d 213 (Minn. App. 2006). In *Ulmer*, we defined "aperture" to mean the "space through which an offender obtains a view," and held narrowly that an "aperture" includes the space above a partition in a public restroom. *Id.* at 216. And this statutory construction was defining a separate subdivision of Minnesota Statutes section 609.746—subdivision 1(c) instead of 1(b) here. Regardless, unlike McReynolds, the perpetrator in *Ulmer* was peering *through* the aperture above the partition, not gazing from within it.

The nature of photos quickly taken and shared on social media—leading too often to sexual exploitation—fundamentally concerns me. But I am further mindful of the integrity of our criminal justice system. We monitor pleas to ensure that we do not imprison people for crimes they did not commit. To expansively define "aperture" in this portion of section 609.746 would do just that—criminalize behavior that, while disturbing, was not intended to be in violation of this "peeping Tom" statute.